



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 215, 219, and 235

[Docket DARS-2016-0030]

RIN 0750-AJ03

**Defense Federal Acquisition Regulation Supplement: Pilot
Program for Streamlining Awards for Innovative Technology
Projects (DFARS Case 2016-D016)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2016 that provides exceptions from the certified cost and pricing data requirements and from the records examination requirement for certain awards to small businesses or nontraditional defense contractors.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2016-D016,

using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2016-D016" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2016-D016." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2016-D016" on your attached document.

- o Email: osd.dfars@mail.mil. Include DFARS Case 2016-D016 in the subject line of the message.

- o Fax: 571-372-6094.

- o Mail: Defense Acquisition Regulations System, Attn: Ms. Jennifer D. Johnson, OUSD(AT&L)DPAP/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer D. Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

This rule proposes to revise the DFARS to implement section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 873 provides an exception from certified cost and pricing data requirements for contracts, subcontracts, or modifications of contracts or subcontracts valued at less than \$7.5 million awarded to a small business or nontraditional defense contractor pursuant to a technical, merit-based selection procedure (e.g., broad agency announcement) or the Small Business Innovation Research (SBIR) Program. Section 873 provides authority to determine that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor or analysis of other information specific to the award. Section 873 also provides an exception from the records examination requirement at 10 U.S.C. 2313 for contracts valued at less than \$7.5 million awarded to a small business or nontraditional defense contractor pursuant to a technical, merit-based selection procedure (e.g., broad agency announcement) or the SBIR Program. Section 873 provides authority to determine that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor or analysis of

other information specific to the award. These exceptions end on October 1, 2020.

II. Discussion and Analysis

This rule proposes amendments to DFARS subpart 215.4, subpart 219.2, and part 235 as summarized in the following paragraphs:

A. Subpart 215.4, Contract Pricing.

- 215.401, Definitions. This section is added to provide a definition of "nontraditional defense contractor," consistent with section 873 of the NDAA for FY 2016.
- 215.403-1, Prohibition on Obtaining Certified cost or Pricing Data. This section is amended to add text implementing the exception in section 873 from certified cost or pricing data requirements.
- 215.404-2, Data to Support Proposal Analysis. This section is amended to add text implementing the exception in section 873 from the records examination requirement.

B. Subpart 219.2, Policies. At section 219.202, Specific Policies, introductory text is added to provide a cross reference to refer contracting officers to the new text in DFARS 215.403-1 and 215.404-2.

C. Part 235, Research and Development Contracting. Section 235.016, Broad Agency Announcement, is added to refer contracting officers to the new text in subpart 215.4.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

This rule proposes to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 873 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2016 (Pub. L. 114-92). Section 873 provides an exception from

certified cost and pricing data requirements for contracts, subcontracts, or modifications of contracts or subcontracts valued at less than \$7.5 million awarded to a small business or nontraditional defense contractor pursuant to a technical, merit-based selection procedure (e.g., broad agency announcement) or the Small Business Innovation Research Program. Section 873 provides authority to determine that submission of cost and pricing data should be required based on past performance of the specific small business or nontraditional defense contractor or analysis of other information specific to the award. Section 873 also provides an exception from the records examination requirement at 10 U.S.C. 2313 for contracts valued at less than \$7.5 million awarded to a small business or nontraditional defense contractor pursuant to a technical, merit-based selection procedure (e.g., broad agency announcement) or the Small Business Innovation Research Program. Section 873 provides authority to determine that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor or analysis of other information specific to the award. These exceptions end on October 1, 2020.

The objectives of this rule are to implement statutory exceptions from certified cost and pricing data requirements and from the records examination requirement, thereby streamlining

awards for innovative technology projects to small businesses and nontraditional defense contractors. The legal basis for the rule is section 873 of the NDAA for FY 2016.

The rule will apply to small entities who receive awards pursuant to a broad agency announcement or the Small Business Innovation Research Program. DoD has awarded such contracts valued at less than \$7.5 million to approximately 1,120 unique small entities per year during the last three years.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The rule does not duplicate, overlap, or conflict with any other Federal rules.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (DFARS Case 2016-D016), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of

Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 215, 219, and 235

Government procurement.

Jennifer L. Hawes,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 215, 219, and 235 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 215, 219, and 235 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 215—CONTRACTING BY NEGOTIATION

2. Add section 215.401 to read as follows:

215.401 Definitions.

Nontraditional defense contractor, as used in this subpart, means an entity that is not currently performing and has not performed any contract or subcontract for DoD that is subject to full coverage under the cost accounting standards prescribed pursuant to 41 U.S.C. 1502 and the regulations implementing such section, for at least the 1-year period preceding the solicitation of sources by DoD for the procurement (10 U.S.C. 2302(9)).

3. Revise section 215.403-1(b) to read as follows:

215.403-1 Prohibition on obtaining certified cost or pricing data (10 U.S.C. 2306a and 41 U.S.C. chapter 35) .

(b) Exceptions to certified cost or pricing data requirements. (i) Follow the procedures at PGI 215.403-1(b) .

(ii)(A) Until October 1, 2020, except as provided in paragraph (b)(ii)(B) of this section, the requirement to submit certified cost or pricing data shall not apply to contracts, subcontracts, or modifications of contracts or subcontracts valued at less than \$7.5 million awarded to a small business concern or nontraditional defense contractor pursuant to—

(1) A broad agency announcement containing technical, merit-based selection criteria (see FAR 35.016(b)(2)); or

(2) The Small Business Innovation Research Program.

(B) Notwithstanding the exception in paragraph (b)(ii)(A) of this section, the head of the contracting activity may determine that submission of certified cost or pricing data should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

* * * * *

4. Revise section 215.404-2 to read as follows:

215.404-2 Data to support proposal analysis.

(a)(i) Until October 1, 2020, except as provided in paragraph (a)(ii) of this section, the requirement for records examination

under 10 U.S.C. 2313(b) shall not apply to a contract valued at less than \$7.5 million awarded to a small business concern or nontraditional defense contractor pursuant to—

(A) A broad agency announcement containing technical, merit-based selection criteria (see FAR 35.016(b)(2)); or

(B) The Small Business Innovation Research Program.

(ii) Notwithstanding the exception in paragraph (a)(i) of this section, the head of the contracting activity may determine that auditing of records should be required based on past performance of the specific small business or nontraditional defense contractor, or based on analysis of other information specific to the award.

(b) See PGI 215.404-2 for guidance on obtaining field pricing or audit assistance.

PART 219—SMALL BUSINESS PROGRAMS

5. Revise section 219.202 to read as follows:

219.202 Specific policies.

See 215.403-1 and 215.404-2 when contemplating award of a contract, subcontract, or modification to a small business or nontraditional defense contractor, as defined in subpart 215.4.

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

6. Add section 235.016 to read as follows:

235.016 Broad agency announcement.

See 215.403-1 and 215.404-2 when contemplating award of a contract, subcontract, or modification to a small business or nontraditional defense contractor, as defined in subpart 215.4.

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